Office - Supreme Court, U.S.
FILED
NOV 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-175

In the Supreme Court of the United States

OCTOBER TERM, 1982

TOMMY SWAREK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion for a new trial on the ground that his "newly discovered evidence" would not probably result in an acquittal on retrial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Dunn v. *United States*, 284 U.S. 390 8

Standefer v. *United States*, 447 U.S. 10 9

United States v. *Agurs*, 427 U.S. 97 ..... 6, 7

United States v. *Ahern*, 612 F. 2d 507 6

United States v. *Buttram*, 432 F. Supp. 1269, aff'd, 568 F. 2d 770, cert. denied, 435 U.S. 995 8-9

United States v. *Smallwood*, 443 F. 2d 535 8

United States v. *Swarek*, 656 F. 2d 331 2

United States v. *Ward*, 544 F. 2d 975 5

United States v. *Wright*, 625 F. 2d 1017 6

Statutes and rule:

15 U.S.C. 681(d) 2

15 U.S.C. 683(b), (c) 3

18 U.S.C. 371 1

Fed. R. Evid. 804(b)(1) 8

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-175

TOMMY SWAREK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-6) is reported at 677 F.2d 41.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1982. A petition for rehearing was denied on June 3, 1982 (Pet. App. A-7). The petition for a writ of certiorari was filed on August 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted of conspiring to defraud the Small Business Administration, an agency of the United States, in violation of 18 U.S.C. 371. He was sentenced to four years' imprisonment,

with three and one-half years suspended in favor of probation. The court of appeals affirmed, *United States* v. *Swarek*, 656 F.2d 331 (8th Cir.), and this Court denied a petition for a writ of certiorari, 454 U.S. 1034 (1981). Thereafter, petitioner filed a motion for a new trial on the ground that testimony given by a co-defendant, William R. Smith, Sr., at Smith's separate trial constituted newly discovered evidence that entitled petitioner to a new trial.[1] The district court denied petitioner's motion, concluding that " 'there was no testimony in Smith's trial which could have been construed as exculpatory as to [petitioner], and certainly not the testimony of Smith.' " *United States* v. *Swarek*, No. LR-CR-79-80 (E.D. Ark. Dec. 3, 1981) (order), quoted at Pet. App. A-4. The court of appeals affirmed. Pet. App. A-1 to A-6.

The evidence adduced at petitioner's trial showed that in 1977 Smith and his son purchased a majority of the stock of Venture Capital, Inc., an investment company that was licensed by the SBA to provide financing for small businesses. See 15 U.S.C. 681(d). In order to supplement the funds that are available to such companies to make loans to small businesses, the SBA is authorized to purchase debentures or stock issued by the companies, provided that the amount purchased does not exceed a specified percentage of the investment company's total paid in capital and paid in surplus. This percentage increases when the sum of the company's paid in capital and paid in surplus exceeds

---

[1]Smith and petitioner were charged in the same indictment with conspiring to defraud the SBA. Shortly after the indictment was returned, Smith began suffering from physical and mental infirmities, as a result of which petitioner and Smith moved for continuances on three separate occasions. The district court granted the first two continuances; it refused to grant the third request and instead severed the cases for trial. After petitioner had been convicted, Smith was acquitted in February 1981. Pet. App. A-1 to A-2.

$500,000. See 15 U.S.C. 683(b), (c). The charges against petitioner and Smith arose out of their alleged agreement falsely to represent to the SBA that Venture's total paid in capital and paid in surplus exceeded the $500,000 minimum. Pet. App. A-2; 656 F.2d at 333-334; Tr. 223.

Petitioner was the sole shareholder of ~~ark-la-tex,~~ ARK-LA-TEX a corporation petitioner had formed to handle his diverse business activities. Among the corporation's alleged assets were a motion picture film and a non-operating oil refinery. In September 1977, petitioner contacted two acquaintances and attempted to persuade them to purchase the movie and the refinery. 656 F. 2d at 334.

Although petitioner was not authorized to negotiate loans from Venture, he promised the two prospective purchasers that if they would form corporations to buy the two assets, Venture would provide the financing. Meanwhile, petitioner explained his plan to Smith and inquired about the possibility of Venture's providing the approximately $400,000 needed to finance the sales. An obstacle to the consummation of the plan, however, was that Venture's paid in capital was only $297,000. Accordingly, Smith suggested, and petitioner agreed, that they seek additional capital by means of a loan from Planters Savings and Trust Bank of Opelousas, Louisiana. 656 F.2d at 334; Tr. 73-77, 120-123, 437.

The scheme that petitioner and Smith devised to obtain the loan and to increase Venture's paid in capital and surplus above the $500,000 minimum, so as to render it eligible for additional SBA funding, involved the following circular transactions, which ultimately were consummated on November 7, 1977: (1) Planters loaned $400,000 to Smith personally; (2) Smith used the $400,000 to purchase 80,000 shares of Venture stock, thereby increasing Venture's paid in capital to $697,000; (3) Venture then loaned $200,000 to each of

the two businesses that petitioner had persuaded to buy his movie and refinery assets; (4) the two businesses paid petitioner's corporation, ARK-LA-TEX, $400,000 for the two assets; (5) ARK-LA-TEX transferred the $400,000 to a second corporation owned by petitioner; (6) this second corporation purchased a $400,000 certificate of deposit from Planters; (7) this certificate and the 80,000 shares of Venture stock purchased by Smith were used to secure the loan. Because Venture, the motion picture corporation, and the oil refinery corporation each had checking accounts at Planters, the money literally never left the bank. Pet. App. A-3; 656 F.2d at 334-335; Tr. 21-23, 25-26, 149-150.[2]

Smith presented his loan application to Planters' loan committee on November 2, 1977. On November 3, 1977, he notified the SBA that Venture was increasing its paid in capital above the $500,000 minimum and wished to apply for additional funding. On November 7, at Smith's and petitioner's request, a Planters loan officer notified the SBA that $500,000 had been deposited in Venture's demand checking account at Planters, $400,000 of which was intended to be used to fund two separate loans. Several days later, Smith and Venture's president met with SBA officials and presented Venture's application for additional funding. The application indicated that Venture had recently received $400,000 in paid in capital, which increased its total paid in capital to over $500,000. Although Venture already had loaned the $400,000 to the two corporations that were purchasing petitioner's assets, the application mentioned only that Venture was considering loaning $200,000 to the oil refinery corporation and made no reference to the loan

---

[2]Venture's loan checks to the motion picture and oil refinery businesses were concealed from Venture's president. At Smith's and petitioner's request, a Planters employee agreed to act temporarily as Venture's vice-president and to sign the loan checks. 656 F.2d at 335; Tr. 59-60, 300.

to the motion picture corporation. 656 F.2d at 334-335; Tr. 29-30, 222, 224-227, 233-234, 300-301, 306.

The SBA agreed to provide additional funding and, accordingly, paid Venture $150,000 on December 23, 1977, and $547,000 on January 13, 1978. Soon after the money was deposited, the bulk of it was loaned to provide financing for individuals purchasing carpet businesses owned by petitioner. 656 F.2d at 335; Tr. 171-175, 234, 302-308.

Smith failed to repay the Planters loan when it became due in September 1978, and in April 1979 Planters satisfied the loan by cashing the certificate of deposit that had been given as security. 656 F.2d at 335; Tr. 151.

ARGUMENT

Petitioner contends (Pet. 7-11) that the court of appeals erred in affirming the denial of his motion for a new trial on the ground that he failed to establish that his "newly discovered evidence" would probably result in an acquittal on retrial.[3] There is no conflict among the courts of appeals or with the decisions of this Court concerning the standard applied by the courts below (see Pet. 7), and the application of that standard to the particular facts of this case does not

---

[3]Petitioner asserts (Pet. 7) that the court of appeals "for all practical purposes, held that [petitioner] met the first four prerequisites" for the granting of a motion for a new trial on the basis of newly discovered evidence. In fact, however, the court of appeals merely assumed *arguendo* that petitioner's evidence met the following criteria:

> (1) the evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cumulative or impeaching; [and] (4) it must be material to the issues involved.

Pet. App. A-4, quoting *United States* v. *Ward*, 544 F.2d 975, 977 (8th Cir. 1976).

present an issue requiring the Court's intervention. In any event, that question was correctly decided below. Further review by this Court therefore is not warranted.

1. As this Court noted in *United States* v. *Agurs*, 427 U.S. 97, 111 & n.19, "the standard generally applied by lower courts in evaluating motions for new trial * * * based on newly discovered evidence" is whether "that newly discovered evidence probably would have resulted in acquittal." See, *e.g.*, *United States* v. *Wright*, 625 F.2d 1017, 1020 (1st Cir. 1980); *United States* v. *Ahern*, 612 F.2d 507, 509 (10th Cir. 1980).[4] Petitioner has provided no authority in support of his suggestion that this now uniform standard should vary depending upon the nature of the particular item of "newly discovered evidence" presented, specifically, that where the newly discovered evidence is the testimony of the second conspirator in a two-person conspiracy case, "a presumption should exist that the evidence would have made a significant difference and would in all probability produce an acquittal when the defendant satisfies the first four prerequisites, and the burden should then shift to the government to rebut such a presumption" (Pet. 9).

Even where the evidence newly discovered by the defendant was all along in the hands of the prosecution, this Court has held that the prosecution's failure to have provided the evidence to the defense constitutes a violation of due process only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *United States* v. *Agurs*, *supra*, 427 U.S. at 112. The trial court thus must balance the weight of the newly discovered evidence against that which was introduced at trial. *Ibid.* By contrast, petitioner's theory requires a *presumption* that his newly discovered evidence would produce a reasonable doubt. But if a defendant

---

[4]The cited cases indicate that such a motion is addressed to the discretion of the trial judge.

is not entitled to such a presumption even where the evidence all along was in the hands of the prosecution, he surely is not so entitled where the evidence "simply [is] discovered from a neutral source after trial." *United States* v. *Agurs, supra*, 427 U.S. at 111.

2. Applying the well-established standard for evaluating a motion for a new trial based on newly discovered evidence to the facts of this case, it is clear that Smith's testimony would not probably have resulted in petitioner's acquittal on retrial.

Petitioner claims (Pet. 8-9) that Smith would testify that he knew nothing about the terms of the Planters loan, in particular, that he knew nothing about the certificate of deposit that was pledged as collateral for the loan, because he was not at the November 7 meeting at which the pledge documents were finally executed. Such an assertion, however, is belied by evidence that Smith was present at the November 2 meeting at which the pledge of the CD was discussed (Tr. 458-459) and by evidence of his submission to Planters of the loan application, which included the pledge of the CD as collateral. 656 F. 2d at 334; Tr. 2-23. Petitioner further contends (Pet. 9) that Smith also would testify that "to his knowledge the loans to purchase the movie and the oil refinery were legitimate loans to purchase real assets," that "he [Smith] didn't submit or cause to be submitted any false information to the SBA since he did not prepare or have anything to do with the preparation of the loan application," and that "to his knowledge, no false information was submitted or intended to be submitted to the SBA." But these protestations likewise are severely undermined by the record evidence that Smith and petitioner secured a temporary vice-president for Venture, who wrote the loan checks (Tr. 59-60), and that Smith presented Venture's application for additional funding to the SBA—an application that omitted the fact that Venture already had loaned

$400,000 of Venture's increased capital to the two corporations. 656 F.2d at 335; Tr. 233-234, 306. In view of this substantial evidence that Smith knew of the fraudulent nature of Venture's representations to the SBA, it is clear that his blanket denials on retrial would be unlikely to produce an acquittal of petitioner.

In addition, we note that petitioner's reliance at retrial on Smith's testimony would be severely hampered by petitioner's own testimony at his first trial. For example, contrary to Smith's allegation that he knew nothing about the pledge of the certificate of deposit, petitioner himself testified that Smith was present at the November 2 meeting with Planters bank officials during which petitioner offered to pledge the CD (Tr. 458-459).[5] Similarly, while at petitioner's trial Ronald Pruner, the temporary Venture vice-president, testified that both petitioner and Smith had asked him to sign checks for Venture (Tr. 60), Smith testified at his trial that he had "nothing whatsoever to do" with Pruner's involvement. Tr. 19-20, *United States* v. *Smith*, Case No. LR-CR-79-80-1 (E.D. Ark.). On retrial, Pruner's testimony thus also would contradict Smith's.

At bottom, petitioner is complaining of nothing more than inconsistent verdicts,[6] but there is nothing legally objectionable about such inconsistency. See *Dunn* v. *United States*, 284 U.S. 390, 393-394 (1932); *United States* v. *Smallwood*, 443 F.2d 535, 543 (8th Cir. 1971); *United States* v. *Buttram*, 432 F. Supp. 1269, 1273 (W.D. Pa.), aff'd, 568

---

[5]Even if petitioner chose not to testify on retrial, his prior testimony could be admitted as a hearsay exception under Fed. R. Evid 804(b)(1).

[6]The court of appeals rejected the government's contention that, because the indictment charged that petitioner and Smith conspired together "and with other persons," there is no inconsistency between an acquittal of Smith and a conviction of petitioner on the conspiracy charge. Pet. App. A-5 n.3.

F. 2d 770 (3d Cir. 1977) (table), cert. denied, 435 U.S. 995 (1978). Even had Smith been tried first and acquitted, petitioner could not prevent his "inconsistent" conviction at his own, separate trial on that account. *Standefer* v. *United States*, 447 U.S. 10 (1980). In these circumstances, the district court did not abuse its discretion in denying petitioner's motion for a new trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

NOVEMBER 1982

DOJ-1982-11